

UNITED STATES DISTRICT COURT **Sep 17, 2018**
EASTERN DISTRICT OF WASHINGTON **SEAN F. McAVOY, CLERK**

SEASIDE INLAND TRANSPORT,

Plaintiff,

v.

COASTAL CARRIERS LLC; JOHN DUNARD AND NICOLE DUNARD, husband and wife; COASTAL CARRIERS TRUCK LINES, LLC; JOHN HARREL, a single man; VALKYRIE EXPRESS LLC; and VALKYRIE LOGISTICS LLC,

Defendants.

COASTAL CARRIERS, LLC,

Third-Party Plaintiff,

v.

PAUL MASSINGILL, a Washington individual; and SERVICE DRIVEN TRANSPORT, INC., a Washington corporation,

Third-Party Defendants.

PAUL MASSINGILL,

Third-Party Plaintiff,

v.

COASTAL CARRIERS LLC, and JOHN DUNARD AND NICOLE DUNARD,

Third-Party

No. 2:17-CV-00143-SMJ

ORDER DENYING PARTIAL SUMMARY JUDGMENT

Defendants.

The pleadings in this case thus far involve a series of complaints, counterclaims, third-party claims, and amendments. Presently at issue is Coastal Carriers, LLC’s (“Coastal”) counterclaim against Seaside Inland Transport (“Seaside”) and third-party claim against Paul Massingill (“Massingill”) and Service Driven Transport, Inc. (“Service Driven”¹). Seaside, Massingill, and Service Driven (collectively, “Movants”) move for partial summary judgment, ECF No. 96, on Coastal’s state law breach of contract and alter ego counterclaims and third-party claims. *Id.* Having reviewed the pleadings and the file in this matter, the Court is fully informed and denies the motion.

I. LEGAL STANDARD

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment is appropriate if the record establishes “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties’ differing versions of the truth.” *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th

¹ While Coastal did not allege breach of contract against Service Driven, Service Driven joins the motion because it may still be liable under the alter ego theory. See ECF No. 9 at 7.

1 Cir. 1982).

2 The moving party has the initial burden of showing that no reasonable trier of
3 fact could find other than for the moving party. *Celotex Corp. v. Catrett*, 477 U.S.
4 317, 325 (1986). Once the moving party meets its burden, the nonmoving party must
5 point to specific facts establishing a genuine dispute of material fact for trial.
6 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

7 “[A] mere ‘scintilla’ of evidence will be insufficient to defeat a properly
8 supported motion for summary judgment; instead, the nonmoving party must
9 introduce some ‘significant probative evidence tending to support the complaint.’”

10 *Fazio v. City & Cty. of San Francisco*, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting
11 *Anderson*, 477 U.S. at 249, 252). If the nonmoving party fails to make such a
12 showing for any of the elements essential to its case as to which it would have the
13 burden of proof at trial, the trial court should grant the summary judgment motion.
14 *Celotex*, 477 U.S. at 322.

15 The Court is to view the facts and draw inferences in the manner most
16 favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Chaffin v. United*
17 *States*, 176 F.3d 1208, 1213 (9th Cir. 1999). And, the Court “must not grant
18 summary judgment based on [its] determination that one set of facts is more
19 believable than another.” *Nelson v. City of Davis*, 571 F.3d 924, 929 (9th Cir. 2009).

II. BACKGROUND²

Paul Massingill is the principal of Seaside, a corporation formed in California and doing business in Wenatchee, Washington. John and Nicole Dunard are the principals of Coastal, a freight brokerage company that connects a shipper of freight with a carrier to haul the freight. ECF No. 109. Coastal bills the shipper and pays the carrier. *Id.*

In January 2, 2002, Massingill (DBA Seaside Inland Transport) and Coastal Carriers, Inc. (“CCI”)³ entered into a written agreement (the “Agreement”) for Massingill to be CCI’s agent. ECF No. 97. Using CCI’s shipping management software, shipper invoicing, carrier payment, account receivable, and other services, Massingill brokered freight shipments in CCI’s name. *Id.* Massingill in turn received a percentage of the freight charges that CCI invoiced a shipper. *Id.*

Under the terms of the Agreement, Massingill “must” be liable for “uncollectable freight bills and/or for claims resulting from the errors or omissions of [Massingill] while performing his duties as defined by this Agreement” (the “Liability Clause”). ECF No. 9 at 13. Moreover, Massingill agreed to secure a credit

² In ruling on the summary judgment motion, the Court considered the facts and all reasonable inferences therefrom as contained in the submitted affidavits, declarations, exhibits, and depositions, in the light most favorable to the party opposing the motion—Coastal. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999).

³ CCI—Coastal's predecessor-in-interest—is not involved in this case.

1 release from CCI prior to committing to providing service. Failure to receive credit
2 approval would result in his being responsible to CCI for 100% of the full amount
3 of the freight charges (the “Credit Clause”). ECF No. 97 at 3. This agency
4 relationship continued until 2004, when Massingill incorporated Seaside in
5 California. *Id.* at 3–4.

6 With CCI’s knowledge, Seaside assumed Massingill’s role as CCI’s broker.
7 Although Seaside did not sign anew the Agreement or any other written agreement
8 containing the Liability Clause or Credit Clause, Seaside operated in a manner
9 consistent with the terms of the Agreement. *Id.* at 4.

10 In 2012, Seaside located Bonerts as a shipper. *Id.* Seaside notified CCI about
11 Bonerts, secured CCI’s credit release to broker Bonerts’ shipments, and brokered
12 shipments in CCI’s name. *Id.* at 5. On October 7, 2015, Mr. Dunard informed
13 Seaside that Bonerts was delinquent on its shipping fees, but nonetheless directed
14 Seaside to continue brokering Bonerts’ freight. ECF No. 99-1 at 6. It also increased
15 CCI’s credit limit for Bonerts. *Id.*

16 On April 13, 2016, Massingill emailed Seaside employees to stop further
17 Bonerts shipments until CCI directed otherwise. *Id.* at 9. On April 18, 2016, CCI’s
18 Controller JC Harrell emailed Seaside to allow credit release on Bonert. *Id.*
19 Subsequently, CCI directed Seaside to divert Bonerts’ freight to a cold storage

1 warehouse instead of its intended destination. ECF No. 97 at 8. CCI then sold
2 Bonerts' freight—pies—to third parties and retained the money collected. *Id.*

3 On July 6, 2016, Mr. Dunard formed Coastal as a Missouri limited liability
4 company. *Id.* On November 1, 2016, CCI voluntarily ceased to exist. *Id.* at 9. On
5 March 13, 2017, Mr. Dunard terminated Coastal's business relationship with
6 Seaside after they were unable to enter into a written agreement on the terms of their
7 relationship. *Id.* at 23–24. At the time of termination, there was a balance of
8 uncollectable freight bills procured by Seaside totaling \$742,302.67. ECF No. 9 at
9 3. In accordance with applicable regulatory requirements, Coastal paid the carriers
10 for these uncollectable freight bills. *Id.* Coastal also paid Seaside a commission of
11 \$109,828.00 on these uncollectable freight bills. *Id.*

12 On May 30, 2017, Coastal asserted a counterclaim and third-party claim of
13 breach of contract under the Liability Clause and Credit Clause.⁴ ECF No. 9. It
14 argues that Seaside, as well as its alter-ego Massingill and Service Driven, have
15 refused to pay the amount it is owed: \$742,306.67 in uncollected freight charges
16 and \$109,828.00 in commission reimbursement. *Id.*

17 **III. DISCUSSION**

18 Movants argue that Coastal's claim is barred by: (1) Washington's Uniform
19

20 ⁴ Coastal also claimed a violation of the Computer Fraud and Abuse Act, which is
not the subject of this partial summary judgment motion. ECF No. 9 at 7–8.

1 Business Organizations Code, (2) the Statute of Frauds, (3) the equitable doctrine
2 of estoppel, and (4) the lack of evidence of breach under the Liability Clause and
3 Credit Clause. ECF No. 96. The Court addresses these arguments in turn.

4 **A. Washington's Uniform Business Organizations Code**

5 A foreign entity doing business in Washington “may not maintain an action
6 or proceeding in this state unless it is registered to do business in [the] state and has
7 paid [] [the] state all fees and penalties for the years, or parts thereof, during which
8 it did business . . . without having registered.” Wash. Rev. Code (“RCW”)
9 23.95.505(2). “Proceeding” includes a civil suit. RCW 23.95.105(29). Moreover,
10 this rule applies to a foreign entity’s successor. RCW 23.95.505(3).

11 Movants argue that because Coastal has failed to register as a foreign entity
12 doing business in Washington, it may not maintain a proceeding in the state. They
13 request a stay of proceedings until Coastal registers.

14 Coastal responds that Movants failed to assert this affirmative defense in their
15 responsive pleading and thus, waived it. ECF No. 108 at 7. Coastal alternatively
16 argues that it engaged in interstate commerce by using independent contractors and
17 so, was not subject to the registration requirement. *Id.*

18 **1. Waiver**

19 The Court rejects the waiver argument. While state law defines the nature of
20 an affirmative defense in a diversity action, the Federal Rules of Civil Procedure

1 provide the manner and time in which the defense is raised and when waiver occurs.

2 *Healy Tibbitts Constr. Co. v. Ins. Co. of N. Am.*, 679 F.2d 803, 804 (9th Cir. 1982)

3 (per curiam).

4 The Ninth Circuit “liberalized” the requirement that affirmative defenses be
5 raised in an initial pleading: the failure to assert an affirmative defense in the initial
6 pleading does not necessarily waive the defense. *Rivera v. Anaya*, 726 F.2d 564,
7 566 (9th Cir. 1984) (allowing the defendant to raise the statute of limitations defense
8 for the first time in a summary judgment motion); *see also Healy Tibbitts*, 679 F.2d
9 at 804 (holding that absent prejudice, a party may raise an affirmative defense in a
10 summary judgment motion). Here, Coastal does not claim prejudice. Therefore, the
11 waiver argument is unavailing.

12 **2. Doing business in Washington**

13 A foreign entity does not “do business” in Washington when it sells through
14 independent contractors or does business in interstate commerce. RCW
15 23.95.520(1)(e) and (1)(f). Coastal argues that several facts support its argument
16 that it did not do business in Washington: (1) it is based in Missouri, (2) it engaged
17 in interstate commerce by using independent contractors throughout the country,
18 (3) it did not have employees in Washington, and (4) it does not have any offices or
19 property in the state. ECF No. 108 at 7.

1 These facts, Coastal seems to argue, *ipso facto* lead to the conclusion that it
2 falls under the exceptions in RCW 23.95.520(1)(e) and (1)(f). The Court disagrees.
3 For example, Coastal fails to explain, through legal authority or any argument, why
4 it should be considered a “seller” under RCW 23.95.520(1)(e). Moreover, just
5 because it did not have employees or offices, or its principal place of business in
6 Washington, does not mean that it was engaged in interstate commerce; in such
7 cases, then, almost all “foreign” entities would automatically fall under this
8 exception. *See* RCW 23.95.105(10) (defining “foreign” as being governed by the
9 law of another jurisdiction). Because Coastal fails to meet its shifted burden, the
10 Court concludes that allowing it to proceed under state law is improper.
11 Accordingly, the Court stays Coastal’s counterclaim and third-party claim against
12 Movants until it obtains a certificate of registration. *See* RCW 23.95.505(4).

13 **B. Washington Statute of Frauds**

14 Movants argue that the Washington Statute of Frauds precludes Coastal from
15 claiming breach of contract because Seaside signed no writing. ECF No. 96 at 14.
16 In response, Coastal argues that there was a novation, or a new contractual relation,
17 between Seaside and Coastal. ECF No. 48 at 10. A novation “may be either the
18 substitution of a new obligation for an old one between the same parties with intent
19 to displace the old obligation with the new, or the substitution of a new debtor for
20 the old one with intent to discharge the old debtor, or the substitution of a new

1 creditor with intent to transfer the rights of the old creditor to the new.” *Macpherson*
2 *v. Franco*, 34 Wn. 2d 179, 182 (1949).

3 Indeed, as evidence of novation, Seaside continued to operate under the terms
4 of the Agreement, and received its commission accordingly. Its own attorney, in a
5 letter to Mr. Dunard following the termination of Seaside and Coastal’s business
6 relationship, cited to the Agreement as having been in effect for fifteen years up
7 until March 13, 2017. ECF No. 50 at 11. Additionally, Massingill signed the
8 Agreement himself, “DBA Seaside Inland Transport.” As such, the Agreement was
9 a sufficient writing, and Movants cannot assert the Statute of Frauds defense.⁵

10 **C. Equitable Estoppel**

11 Movants claim that equitable estoppel applies because Seaside brokered
12 Bonerts’ shipments only as expressly directed by CCI. ECF No. 112 at 9. Under
13 Local Rule 56.1(d), the Court may assume that Movants’ facts are uncontested
14 if Coastal does not file, separately from the memorandum of law, the specific facts
15 that establish a genuine dispute. Here, Coastal did not file a separate statement of
16 facts to clarify or dispute any of Movants’ facts and as such, the Court accepts
17 Movants’ facts without controversy.⁶

18 _____
19 ⁵ In any case, Movants fail to establish that a writing was even required under the
Washington Statute of Frauds.

20 ⁶ Coastal cites its previously-submitted Statement of Facts, ECF No. 49, in
opposition to a previous partial summary judgment motion. However, the Court has
already stricken that partial summary judgment motion, which struck the linked

1 Equitable estoppel requires: (1) an admission, statement, or act inconsistent
2 with a claim afterward asserted; (2) action by another in reasonable reliance on that
3 act, statement, or admission; and (3) injury to the relying party if the Court allows
4 the first party to contradict or repudiate the prior act, statement, or admission.

5 *Robinson v. City of Seattle*, 119 Wash. 2d 34, 82 (1992). Because estoppel is not
6 favored, the party asserting estoppel must prove each element by clear, cogent and
7 convincing evidence. *Colonial Imps., Inc. v. Carlton Nw., Inc.*, 121 Wash. 2d 726,
8 734 (1993).

9 Here, the evidence in the record shows that (1) Coastal authorized Seaside to
10 broker Bonerts' freight, and (2) Seaside did so accordingly in reliance on Coastal's
11 instruction. However, (3) Movants can't show injury. Coastal does not claim that it
12 was Seaside's act of brokering freight for Bonerts that makes Seaside liable—
13 instead, it was Seaside's breach of the Liability Clause or Credit Clause. In other
14 words, while the Court agrees with Movants that Coastal may not challenge
15 Seaside's act of brokering Bonerts' freight, it is not doing so here and thus, is not
16 estopped from asserting its breach of contract claim. Coastal still has to prove such
17 a breach. Therefore, the Court rejects the equitable estoppel argument.

18 **D. Evidence of breach of the Liability Clause or Credit Clause**

19 _____
20 documents as well. ECF No. 55 at 6 ("Because the Court's decision on the instant
motion could materially change the analysis of the parties' summary judgment
arguments, the Court strikes the summary judgment motion.").

1 Lastly, Movants make the final argument that Coastal failed to produce
2 evidence of Seaside's errors/omissions, or failure to secure CCI's credit release, in
3 violation of the Liability Clause and Credit Clause, respectively. They argue
4 Seaside produced evidence that it secured CCI's credit release for Bonerts in May
5 2012, and that CCI increased Bonerts' credit limit in October 2015. ECF No. 96 at
6 16.

7 Coastal responds persuasively that this evidence does not establish as a
8 matter of law that Seaside is not liable for Bonerts' debt, i.e., that it did not err or
9 omit. Evidence that Seaside secured CCI's credit release during standalone periods
10 in time do not account for the entirety of the debt that Bonerts failed to pay.
11 Moreover, even with Seaside's securement of CCI's credit release, this does not
12 establish that Coastal did not subsequently err or omit. The two clauses are not
13 mutually exclusive. Because Seaside's errors and omissions could have arisen after
14 securing credit release, the breach of contract could have arisen after that. Because
15 Movants fail to meet their burden to show that they are entitled to judgment as a
16 matter of law, partial summary judgment in their favor is denied.

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Seaside's, Massingill's, and Service Driven's Motion for Partial
19 Summary Judgment, **ECF No. 96**, is **DENIED**.

2. Coastal's counterclaim and third-party claim is **STAYED** until it obtains a certificate of registration with the Washington Secretary of State pursuant to RCW 23.95.505. No later than **October 17, 2018**, or upon receipt of the certificate, whichever is sooner, Coastal shall file a status report, along with a copy of the certificate and request to lift the stay. If Coastal does not intend to obtain a certificate of registration, it shall file by **October 17, 2018** a motion for dismissal, or face involuntary dismissal.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 17th day of September 2018.

Salvador Mendoza Jr.
SALVADOR MENDOZA, JR.
United States District Judge